

STATE OF IOWA  
DEPARTMENT OF COMMERCE  
UTILITIES BOARD

<p>IN RE:</p> <p>IOWA DEPARTMENT OF JUSTICE, OFFICE OF CONSUMER ADVOCATE,</p> <p style="text-align:center">Complainant,</p> <p style="text-align:center">v.</p> <p>AMERICA'S TELE-NETWORK CORP. and JOHN W. LITTLE, President of America's Tele-Network Corp.,</p> <p style="text-align:center">Respondents.</p>	<p>DOCKET NO. FCU-00-6</p>
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**ORDER GRANTING MOTION FOR CONTINUANCE AND REQUESTING  
INFORMATION AND PARTIAL RULING ON MOTION TO STRIKE**

(Issued January 4, 2001)

On December 15, 2000, America's Tele-Network, Corp. and John W. Little (AT-N) filed Prepared Rebuttal Testimony and Exhibits, Motions for Leave to Depose Complainants, Issue Subpoenas, and Continuance, and an Objection to the Admission of Evidence and Motion to Strike. In its motion for leave to depose each of the customers named in the Request for Formal Complaint Proceedings, AT-N stated "In order for AT-N to effectively present its evidence at the hearing, it is vitally important for AT-N to have the opportunity to question each of the customers (31 in total) ... as to the circumstances that gave rise to their complaints. A total of 59 different instances of violations of Iowa law have been alleged by the OCA, and

thus, the amount of potential penalties at stake is \$590,000 in forfeitures as well as AT-N's future ability to continue doing business in the state of Iowa. Fundamental fairness dictates that AT-N be afforded the opportunity to effectively confront its accusers, and the ability to depose those accusers prior to the hearing is a critical component in preparing for the presentation of AT-N's defenses." AT-N further requested the Board authorize its staff to issue subpoenas duces tecum to each named customer to compel their appearance at the hearing and depositions and to compel production of documents. AT-N further requested a continuance of the hearing to allow it to depose the customers.

In its motion to strike, AT-N stated that Mr. Drennan's testimony incorporated claims of customers not included in the Request for Formal Complaint Proceedings. AT-N stated that these customer complaints were therefore not the subject matter of the hearing, and were therefore irrelevant and immaterial to it. AT-N further stated if new violations are alleged, notions of fair play and due process demand that the Request for Formal Complaint Proceedings be amended and AT-N be afforded a reasonable opportunity to respond. Otherwise, AT-N stated, inclusion of evidence not contemplated by the original request is immaterial, irrelevant, and a violation of due process. AT-N further objected to testimony and exhibits surrounding AT-N's actions in other jurisdictions as being irrelevant and immaterial and a violation of due process, and would unfairly prejudice AT-N. AT-N further alleged that many of the statements and conclusions found in the Drennan testimony were unfounded and based on conjecture only. AT-N moved the Board to strike the testimony and evidence from the record.

The Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed a Response to Objection and Resistance to Motion to Strike on December 26, 2000. The Consumer Advocate stated that the complaint files not in the Request for Formal Complaint Proceedings should not be stricken because they are relevant to the assessment of civil penalties and other appropriate remedies. The Consumer Advocate further alleged that in each of the cases testified to by Mr. Drennan, resolutions were issued by the Board finding that AT-N failed to respond to the Board's complaint investigation, and Mr. Drennan's testimony alerts the Board "to the fact that AT-N is continuing the pattern of misconduct described in Counts I and II of OCA's request for formal complaint proceedings. These are matters properly considered by the Board in determining appropriate penalties and remedies." The Consumer Advocate further alleged that AT-N had the opportunity to respond to the complaints in the informal complaint process, and failed to do so. The Consumer Advocate further alleged that since AT-N did not offer additional evidence or request formal complaint proceedings within 14 days of the issuance of the proposed resolutions, it is bound by them pursuant to 199 IAC 6.8(5).

The Consumer Advocate further alleged that the evidence regarding AT-N's activities in other jurisdictions involving complaints alleging slamming and deceptive practices is properly considered as part of its history of prior violations in determining an appropriate civil penalty. It further alleged that AT-N's "willful and repeated" violations regarding payment of universal service contributions in Federal Communications Commission (FCC) File No. EB-00-IH-0053 were egregious and intentional, and were "similar to its conduct in Iowa." The Consumer Advocate

further stated that the Board may properly consider this evidence of similar conduct in other jurisdictions in determining an appropriate civil penalty in this case. It further stated evidence regarding slamming cases in other jurisdictions is a relevant factor in determining appropriate penalties. The Consumer Advocate further stated that AT-N provides no basis for striking Mr. Drennan's opinions and conclusions, and it could respond with its own evidence, testimony, and cross-examination. The Consumer Advocate requested that AT-N's objection and motion to strike be denied on all grounds.

On December 28, 2000, the Consumer Advocate filed a Resistance to Application for Leave to Depose, Issuance of Subpoena Duces Tecum, and Continuance. The Consumer Advocate stated that since AT-N's motion fails to establish that it notified any of the customers of its motions for leave to depose and issuance of subpoenas, they have been deprived of a reasonable opportunity to resist said motions. It further stated that AT-N is required to establish that the subpoena "is reasonably required and specifying as nearly as possible the books, papers, records, accounts or documents desired to be produced and the material or relevant facts to be proved by them." The Consumer Advocate further stated that AT-N has not identified any material or relevant facts to be proved through issuance of the subpoenas, nor is there any reason to compel production of documentary evidence when AT-N is, or should be, in possession of all such materials, and the motions should be denied. The Consumer Advocate further alleged that the request for leave to depose and motion for issuance of subpoenas should be denied because they are irrelevant to the matters at issue and would be unduly burdensome

to the complainants. The Consumer Advocate stated that AT-N is attempting to litigate matters that have already been determined by the Board, and that claim preclusion applies. It argues that AT-N had the opportunity to respond to the complaints in the informal complaint process. The Consumer Advocate argues that AT-N did not file a timely response to the allegations in Count I, and did not request an extension, and therefore the allegations are to be deemed admitted. It further alleges that since AT-N did not request formal complaint proceedings in any of the complaints within the time established by 199 IAC 6.8(5), the Board's proposed resolutions of the complaints are final and binding upon AT-N.

The Consumer Advocate alleges that in the five cases in Count II when AT-N did file timely responses, the Board found that AT-N failed to provide the required proof of authorization for the switch of long distance service, and since AT-N did not request formal complaint proceedings, the Board's decisions are final and binding pursuant to 199 IAC 6.8(5). Therefore, the Consumer Advocate states, AT-N is barred from raising and/or relitigating its defenses with respect to all complaints at issue in this proceeding.

It further states that Board staff found explicitly or implicitly in each case in Counts I and II that AT-N did not supply adequate proof of verification for the switch, and since AT-N did not timely request formal complaint proceedings, it was bound by the Board's finding in each case that it had not supplied adequate proof for the switch of complainants' long distance service.

The Consumer Advocate argued that claim preclusion and res judicata bar AT-N from relitigating the matters growing out of the claims resulting in the Board's

final decisions. The Consumer Advocate stated that since AT-N is attempting to raise matters that were (or could have been) determined in the earlier complaint proceedings, the requests should be denied as they are irrelevant to the matters at issue, since AT-N's violation of the anti-slamming rules has been established in the underlying complaint proceedings. The Consumer Advocate stated that the only matters to be considered in this proceeding are those identified in Iowa Code Supplement § 476.103(4)(b) and 476.103(5) (1999), and that any information relevant to those issues is already contained in the complaint files included as part of the record in this matter. The Consumer Advocate stated that deposing complainants and issuing subpoenas compelling their attendance would cause undue hardship, that complainants have already obtained a favorable result and should not be subject to further proceedings, and that AT-N had a reasonable opportunity to defend itself in the initial complaint proceedings. The Consumer Advocate requested that AT-N's request for leave to depose and motions for issuance of subpoenas be denied.

On December 29, 2000, the Consumer Advocate filed an Application for Separate Adjudication of Law Points. It stated that AT-N's motion for leave to depose and issue subpoenas suggests that AT-N is attempting to litigate matters already finally determined by the Board. The Consumer Advocate restated a number of arguments made in the Resistance filed December 28, 2000. In addition, it stated that since AT-N did not timely file its answer to the complaint, the allegations in Count I should be deemed admitted. The Consumer Advocate requested a separate adjudication of law points finding:

The doctrine of claim preclusion bars AT-N from raising or relitigating any matters, including defenses and affirmative defenses, growing out of the claims that resulted in the Board's final decision in each complaint finding (explicitly or implicitly through the order of slamming remedies) that AT-N did not supply adequate proof of verification for the switch of complainants' long distance service.

The hearing in this case is currently scheduled for January 10, 2001. In order to rule on AT-N's motions and the Consumer Advocate's request for adjudication of law points, the undersigned needs answers to certain questions. In addition, AT-N must be given the opportunity to respond to the Consumer Advocate's request for adjudication of law points. Therefore, the hearing in this case must be continued.

#### **PARTIAL RULING ON OBJECTION AND MOTION TO STRIKE**

In its motion to strike, AT-N stated that Mr. Drennan's testimony incorporated claims of customers not included in the Request for Formal Complaint Proceedings, and that these customer complaints were therefore not the subject matter of the hearing, and were irrelevant and immaterial to it. AT-N argued that either: 1) notions of fair play and due process demand that the Request for Formal Complaint Proceedings be amended and AT-N be afforded a reasonable opportunity to respond; or 2) that the evidence be stricken. Otherwise, AT-N stated, inclusion of evidence not contemplated by the original request is immaterial, irrelevant, and a violation of due process.

The Consumer Advocate stated that the complaint files not in the Request for Formal Complaint Proceedings should not be stricken because they are relevant to the assessment of civil penalties and other appropriate remedies. The Consumer

Advocate further alleged that in each of the cases testified to by Mr. Drennan, resolutions were issued by the Board finding that AT-N failed to respond to the Board's complaint investigation, that Mr. Drennan's testimony alerts the Board that AT-N is continuing its pattern of misconduct, and these are matters properly considered by the Board in determining appropriate penalties and remedies.

Since the request for continuance has been granted, AT-N has the opportunity to respond to the Consumer Advocate's allegations regarding the additional files testified to by Mr. Drennan. The complaints involve slamming, which is the same complaint by the customers in the cases listed in the Request for Formal Proceedings. Therefore, the complaints are relevant to the issues in this case, and the motion to strike testimony regarding them should be denied. The Request for Formal Proceedings is hereby amended to include the complaints referred to in Mr. Drennan's testimony. AT-N is correct that fundamental fairness and due process require it be given a reasonable opportunity to respond to allegations against it. Therefore, no new complaints after the date of this order may be added to this case unless there is undue delay in proceeding to hearing. If the Consumer Advocate wishes to add any other complaints to its Request, it must do so by way of motion with an opportunity for AT-N to respond.

#### **QUESTIONS TO BE ANSWERED BY THE PARTIES**

The parties are directed to answer the following questions. Some of the following questions will require submission of evidence, and some will require legal argument to be submitted by the parties. Testimonial evidence must be presented in



the form of prefiled testimony. Parties may refer to evidence and argument already in the record, including that in the informal complaint files, rather than resubmitting the evidence or restating arguments previously presented in pleadings. Responses must include information specific to the eight cases referred to in Mr. Drennan's testimony as well as those contained in Counts I and II of the Request for Formal Proceedings.

1. For each of the complaint files on the attached list, verify whether the files are completed and closed or not. Provide dates the files were closed. If any remain open, identify them. Identify why they remain open.

2. Did AT-N notify any of the customers in the complaint files of its motion to depose and request for subpoenas? Did it request voluntary cooperation from any of the customers? With what result?

3. Did AT-N receive notice of each of the complaints filed and the proposed resolutions in each case?

4. Are there any cases in which AT-N requested formal complaint proceedings within 14 days after issuance of the proposed resolution?

5. Assuming AT-N did not request formal complaint proceedings within 14 days after issuance of any of the proposed resolutions, and given rule 199 IAC 6.8(5) that states "If no request for formal complaint proceedings is received by the board within 14 days after issuance of the proposed resolution, the proposed resolution will be deemed binding upon all persons notified of the informal proceedings and affected by the proposed resolution", what legal theory would allow

AT-N to relitigate the complaints? What would preclude AT-N from relitigating the complaints?

6. If AT-N did not file a request for formal complaint proceedings within 14 days after issuance of the proposed resolution in each case, and therefore the proposed resolutions are binding on AT-N pursuant to 199 IAC 6.8(5), what could the customers testify to that would be relevant? Provide information specific to each complaint file.

7. Does AT-N dispute that Board staff found it had not provided adequate proof of verification in each of the listed complaint files? If yes, provide information specific to each case. If Board staff did make such a finding in each case, and AT-N is bound by the proposed resolutions pursuant to 199 IAC 6.8(5), what relevant information could any customer provide? Provide information specific to each complaint file.

8. If the Board's final decision in each case was that AT-N had not provided adequate proof of verification for the switch, what could any customer testify to that would be relevant? Provide information specific to each complaint file.

9. Are there any complaints in which there is an outstanding allegation that AT-N did not provide full refunds to the customers named in the complaints? If yes, would deposing the customers and/or requiring their appearance at the hearing solely for testimony regarding the refunds provide relevant evidence?

10. If there is any allegation that a full refund was not provided to any customer named in the complaints, provide the case name and number and

evidence to show whether refunds were or were not provided, and the amount claimed by the customer and the refund provided by AT-N.

11. In AT-N's exhibit filed December 15, 2000, provide an explanation of what pages A-2, A-6, A-13, A-23, A-25, and A-27 are and what proof they provide.

12. If a subpoena duces tecum were issued to the customers in the complaint files, what relevant documents could the customer provide that AT-N does not already have or could not obtain from the complaint files on file at the Utilities Board? Provide information specific to each complaint file.

13. If customers in the complaint files were deposed or subpoenaed to testify, what relevant evidence could they provide that AT-N does not already have or could not obtain from the complaint files at the Utilities Board? Provide information specific to each complaint.

14. In which complaint files did AT-N file a timely response with the IUB?

15. In which complaint files did AT-N file an untimely response with the IUB?

16. In which complaint files did AT-N file no response with the IUB? If AT-N filed no response, why did it not respond? Did AT-N receive notice of the complaint? Provide information specific to each complaint file.

17. Do the parties believe the complainants are parties to this case? Does that affect AT-N's ability to depose them and require their appearance at the hearing? Are the parties serving all pleadings on the complainants?

18. Is the evidence regarding the FCC finding of AT-N's non-contribution to the universal service fund relevant to this case involving slamming complaints? Why or why not?

**IT IS THEREFORE ORDERED:**

1. The hearing in this case is continued until further order.
2. The parties are directed to answer the questions contained in this Order either by presentation of additional evidence or by briefs. Parties will answer the questions simultaneously, and all answers must be filed no later than January 22, 2001. AT-N must file its response to the Consumer Advocate's Request for Adjudication by the same date.
3. AT-N's motion to strike is denied with respect to the eight complaints referred to in Mr. Drennan's testimony. The Request for Formal Proceedings is amended to include the eight listed complaints. No further complaints may be added to this case unless there is undue delay in the hearing in this case, and any party wishing to add additional complaints must file a motion containing the request.
4. A list of complaint files included in the Request for Formal Complaint Proceedings and in Mr. Drennan's testimony is attached to this Order. The parties are to verify that the names and numbers on the list are correct, and if they are incorrect, the correct names and numbers. Verification or notification should also be provided by January 22, 2001.

5. After the above information is submitted, the undersigned will rule on the motions and request for adjudication, and a new hearing date will be set.

**UTILITIES BOARD**

/s/ Amy L. Christensen  
Amy L. Christensen  
Administrative Law Judge

ATTEST:

/s/ Judi K. Cooper  
Acting Executive Secretary

Dated at Des Moines, Iowa, this 4<sup>th</sup> day of January, 2001.

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C Dockets in Request for Formal Complaint Proceedings:

C-00-95	Keplinger
C-00-112	Hrycyszyn
C-00-115	DeVoe
C-00-137	Cook
C-00-141	Graybill
C-00-150	Kaufman
C-00-151	O'Brian
C-00-153	Penner
C-00-158	Berthel
C-00-168	Ruppenkamp
C-00-174	Lynch
C-00-182	Rogers
C-00-183	Tackett
C-00-188	Stepp
C-00-192	Schmalijohn
C-00-207	David
C-00-211	Flickinger
C-00-217	Rubel
C-00-219	Alatalo
C-00-238	Kaberle
C-00-248	Schuldt
C-00-253	Hutchins
C-00-255	Seiberling
C-00-256	Derr
C-00-284	Forbes
C-00-288	Shawver
C-00-319	Crews
C-00-320	Stewart
C-00-328	Bosworth
C-00-336	Lenz
C-00-340	Schmidt

C-Dockets in OCA testimony (Drennan) but not in Request:

C-00-366	Merrick
C-00-368	Meyer
C-00-387	Van Gorder
C-00-407	Theobald
C-00-432	Sickels
C-00-441	Folken (Bravard)
C-00-445	Tillmann (Page)
C-00-458	Fitzgerald